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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RUBEN CHAVIRA, Defendant and Appellant.	E061078 (Super.Ct.No. FWV1202229) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed with directions.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Daniel Ruben Chavira appeals from his conviction of second degree robbery (Penal Code § 211),[1] possession of a firearm with a prior conviction (§ 29900, subd. (a)), four counts of assault with a firearm (§ 245, subd. (b)), and four counts of false imprisonment (§ 236), along with the true findings that he committed these crimes for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)) and that he used a gun in connection with the robbery (§ 12022.53, subd. (b)). Before sentencing, defendant admitted to one prior strike, one prior serious felony, and two prison priors. The court sentenced him to a total term of 52 years in state prison, composed of the following: for the robbery—10 years, plus a consecutive 10 years for the gun use enhancement and a consecutive 10 years for the gang enhancement; four years consecutive for each of the four assaults; five years consecutive for the serious felony prior; and one year consecutive for one of the prison priors. The court stayed the sentences for the four false imprisonments, the possession of a firearm with a prior, and the remaining prison prior.

On appeal, defendant argues that his convictions should be reversed because the trial court improperly admitted gang-related evidence. He also argues that his sentence for one of the assault convictions should be stayed pursuant to section 654. We direct the trial court to stay the sentence for the assault conviction, but otherwise affirm the judgment.

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[1] All additional unspecified statutory references are to the Penal Code.

I

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution's Case*

a. *Evidence of the charged offenses*

On the evening of September 6, 2012, two men entered a Farmer Boys restaurant in Ontario dressed in dark clothing. Both men were wearing gloves and ski masks, and one was carrying a semiautomatic handgun. The restaurant's shift leader, a few other employees, and four customers were inside the restaurant at the time.

The gunman ordered everyone to get down on the floor and pointed his gun at several of the victims. The other man grabbed the shift manager by her shirt and pulled her into the office behind the service counter. He ordered her to open one of the safes. It contained $40 in $5 bills. From the front of the restaurant, the gunman yelled, "Let's go. Let's go." The other man grabbed the $40 and they ran out of the restaurant.

Two officers on patrol about 100 yards from the restaurant happened to observe the robbery through binoculars. The officers watched the two men leave the restaurant, run through the parking lot, and into an industrial park area. Seconds later, a car with a male in the driver's seat and a male in the front passenger seat drove out of the industrial park.

Several police cars in the immediate area began following the car. After driving about four miles, the car exited the freeway and stopped by the side of the road. Ronnie Buzenes was in the driver's seat, Julio Vega was in the front passenger seat, and

defendant was in the backseat behind Buzenes. Police found ski masks and gloves in the car. Defendant's clothing matched the clothing of the gunman in the surveillance footage, and the police found a gun in the backseat of the car next to where he had been sitting. Vega's clothing matched the clothing of the other robbery suspect in the surveillance footage, and the police found $40 in $5 bills in his pocket. Buzenes's clothing did not match the clothing of either of the men in the surveillance footage.

b. *Gang enhancement evidence*

The People's police officer gang expert had worked in the Fontana Police Department for 10 years and in Fontana's gang unit for five years. He specialized in the criminal street gang South Side Fontana, and had testified as an expert on the gang more than 10 times. He explained that South Side Fontana claims territories throughout the Inland Empire and has over 300 members. Its primary activities include murder, attempted murder, carjacking, assault with deadly weapons, and armed robbery.

In his opinion, defendant, Vega, and Buzenes were active members of South Side Fontana. All three men had multiple prior gang-related contacts with law enforcement. Defendant was known as "Demon," and a high-ranking member (an "OG") of South Side Fontana. Buzenes, called "Slugz," was also an OG. Vega was a lower-ranking member of the gang.

The expert had multiple contacts with defendant. On three separate occasions—in 2008, 2010, and 2011—defendant had admitted his membership in South Side Fontana to the expert. The expert knew that several other officers had documented defendant as a

member of the gang as well. The expert had reviewed a 2011 report written by a peace officer, and this report documented that defendant had admitted to being a member of the gang. Additionally, during a search of defendant's residence after his arrest, the police found a 2011 booking document containing several handwritten slogans. The expert testified that the word "Demon" written on the document referenced defendant's gang moniker, and that the other slogans were also gang related.

The prosecutor showed the expert 10 abstracts of judgment containing a total of 16 convictions against seven individuals: Defendant, Vega, Buzenes, Isaac Belmontez, Fernando Chavira,[2] Andrew Valdivia, and Justin Serna.[3] Specifically, these abstracts contained the following: (1) two attempted murder and two assault with a firearm convictions against Andrew Valdivia; (2) one carrying a loaded firearm and one assault with a deadly weapon conviction against Fernando Chavira; (3) one carrying a loaded firearm conviction against Justin Serna; (4) one attempted murder and two assault with a firearm convictions against Isaac Belmontez; (5) Vega's guilty plea to robbery and false imprisonment in this case; and (6) Buzene's guilty plea to burglary and false imprisonment in this case. The expert testified that he knew each of the convicted individuals to be a member of South Side Fontana.

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[2] Fernando Chavira is defendant's brother.

[3] Defendant states that the abstracts of judgment contain 14 convictions in addition to the 2008 robbery conviction against him for a total of 15 convictions. By our count, there are 16.

In the expert's opinion, defendant, Vega, and Buzenes committed the September 6, 2012, crimes in association with and for the benefit of South Side Fontana. He explained that the robbery increased the gang's standing by demonstrating that its members were willing and able to commit violent crimes.

2. *Defense Case*

Buzenes testified as a witness for the defense. He admitted that he was a member of South Side Fontana and had been for about five years. He also admitted that defendant was a member of the gang and had been for about four years. Buzenes had known defendant for most of his life.

According to Buzenes, defendant was not involved in the robbery; he and Vega planned it and committed it, without defendant's knowledge, while defendant was asleep in the car. Buzenes testified that he, defendant, and Vega had spent the day at his house and that, at some point in the evening, defendant had used heroin, vomited on a rug, and "passed out." Buzenes and Vega were driving defendant home when they decided "to drive the freeway and go find somewhere to rob." They noticed the Farmer Boys and Buzenes stopped the car so that he could get a better look at the restaurant. Defendant was asleep in the backseat.

When Buzenes got back into the car, he woke up defendant and asked to borrow his jacket and shoes. Defendant gave him the clothing and did not ask any questions. Vega and Buzenes, who was now wearing defendant's clothing, robbed the restaurant and ran back to the car.

Before driving off, Buzenes took off the jacket, his pants, the shoes, and the ski mask. He threw everything into his car except the pants, which he tossed into a nearby bush.[4] Buzenes later threw his gloves onto the freeway.

At some point during the getaway, defendant woke up and put his jacket back on. He became angry when he learned Buzenes and Vega had robbed a restaurant. He wanted his shoes back, and Buzenes stopped the car to "calm him down." At that point, Buzenes noticed the police approaching his car, so he threw the gun in the backseat next to defendant, and he and defendant quickly put on their shoes.

On cross-examination, Buzenes admitted that he had read the police reports and knew what the witness statements said. He denied that the three of them had planned the robbery in advance, and claimed it was a spontaneous decision. He happened to have surgical gloves in his car, and Vega happened to have two ski masks with him that day. The reason Buzenes borrowed defendant's shoes was because he did not want to get his shoes dirty.

3. *Additional Prosecution Evidence*

According to one of the officers who watched the robbery suspects flee the scene, the total time that passed from when he lost sight of the suspects behind a warehouse in the industrial park to when he saw the getaway car drive away was 5 to 10 seconds. The police searched the area of the industrial park that the getaway car had exited and they

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[4] Buzenes was wearing "basketball shorts" under his pants.

did not find pants or any other items. Two officers testified that they did not see anything discarded out of the window during the pursuit.

The arresting officer testified that he did not notice any movements inside the car after it stopped. During the questioning and arrest, he saw no indications that defendant was ill, intoxicated, or under the influence of narcotics. When he asked Buzenes if there was a gun inside the car, Buzenes responded that he was "only the driver."

II

ANALYSIS

1. *The Challenged Gang-Related Evidence*

Defendant argues that his convictions should be reversed because the court erred in admitting evidence to prove the gang enhancement. We address the challenged evidence below and conclude that none of the alleged errors warrants reversal.

a. *Applicable law*

Section 186.22, subdivision (b)(1) authorizes a sentence enhancement to felonies committed "for the benefit of, at the direction of, or in association with any *criminal street gang*." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 319.) Section 186.22, subdivision (f) defines a criminal street gang as "any ongoing organization, association, or group of three or more persons, whether formal or informal" that has as one of its "primary activities" the commission of one or more statutorily enumerated criminal offenses and that, through its members, engages in a "pattern of criminal gang activity." (*People v. Sengpadychith, supra,* at pp. 319-320.) Thus, when the prosecution alleges a

gang enhancement, it must introduce evidence regarding the defendant's relationship to the gang, the gang's primary activities, and a pattern of criminal activity by the gang's members.

We review a trial court's evidentiary ruling for abuse of discretion and will not overturn the ruling unless it falls " 'outside the bounds of reason.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 714; *People v. Hoyos* (2007) 41 Cal.4th 872, 898.) Evidence Code section 352 gives a court discretion to exclude relevant evidence where its probative value is "*substantially* outweighed" by the probability that its admission will consume too much trial time or create a "substantial danger" of undue prejudice or confusion. (Evid. Code, § 352, italics added.) Evidence is unduly prejudicial if it "tends to create an emotional bias against a defendant that could inflame the jury, while also having a negligible bearing on the issues." (*People v. Lucas* (2014) 60 Cal.4th 153, 268.)

b. *Background facts*

Before trial, the prosecutor disclosed to the defense the abstracts of judgment he intended to use to prove the gang enhancement. Defendant moved to exclude evidence of his 2008 robbery conviction under Evidence Code section 352 on the ground that it was substantially more prejudicial than probative. The court ruled that the evidence was admissible because its probative value in establishing a "pattern of criminal gang activity" outweighed any danger of prejudice. (See Pen. Code, § 186.22, subd. (a).)

Defendant also objected to the admission of any prior convictions of his brother, Fernando Chavira, on the ground that they were irrelevant to the gang enhancement. The court disagreed, reasoning that if the gang expert was able to testify that Fernando Chavira was a member of South Side Fontana, then his prior convictions were relevant.

At trial, defendant did not object at any point while the prosecutor showed 10 abstracts of judgment to the gang expert who explained that the convicted individual in each was a member of South Side Fontana. At the close of the People's case, the court asked defense counsel if she had any objection to admitting the 10 abstracts of judgment. Counsel stated that her "only objection" was to request that the court give a limiting instruction to the jury. Sua sponte, the court raised the issue that it did not want the jury to see the length of the prison sentences for any crimes that were charged in this case (i.e., robbery, false imprisonment, and assault). Both counsel agreed that those prison sentences would be redacted. The court received the abstracts of judgment into evidence as exhibits 57A-57H.

Before and after the jury heard evidence, the court read CALCRIM No. 1403, which provides that gang-related evidence cannot be used to conclude that "the defendant is a person of bad character or that he has a disposition to commit crime."[5]

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[5] CALCRIM No. 1403, as modified by the court, reads:

"You may consider evidence of gang activity only for the limited purpose of deciding whether: [(1)] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged; or [(2)] The defendant had a motive to commit the crimes charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness when you

[footnote continued on next page]

c. *Defendant's 2008 robbery conviction*

Defendant contends that his 2008 robbery conviction was unduly prejudicial propensity evidence and was cumulative in light of admission of the 15 convictions against other South Side Fontana members. We disagree.

i. *The trial court did not err*

In *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*), the California Supreme Court held that the defendant's prior extortion conviction was admissible under Evidence Code section 352 to prove the elements of a Penal Code section 186.22, subdivision (a) conviction for active participation in a criminal street gang in a murder trial. (*Tran, supra,* at p. 1047.) This case is instructive because the court sets forth guidance on analyzing a defendant's prior conviction under Evidence Code section 352 in the context of Penal Code section 186.22 gang allegations.[6] (*Tran, supra,* at pp. 1047-1049.)

The court stated that "the use of evidence of a defendant's separate offense to prove a predicate offense should not generally create 'an intolerable "risk to the fairness

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[footnote continued from previous page]
consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

[6] Even though *Tran* involves the application of section 186.22, subdivision (a), we see no reason why it should not apply with equal force to cases involving the application of subdivision (b). Like subdivision (a), subdivision (b) requires the existence of a "criminal street gang," which means that under both subdivisions the prosecution must establish the "primary activities" of the gang and prove that its members engage in a "pattern of criminal activity." (§ 186.22, subd. (b).)

of the proceedings or the reliability of the outcome." ' " (*Tran*, *supra*, 51 Cal.4th at p. 1048.) A court must balance the probative value of the evidence against its potential to prejudice the defendant. (*Id.* at pp. 1047-1049.)

A defendant's prior offense is "highly probative" of a section 186.22 gang charge or allegation because it provides "direct evidence" of several elements of the prosecution's case, such as the primary activities of the gang, a predicate offense, and a defendant's knowledge that the gang engaged in a pattern of criminal activity. (*Tran, supra,* 51 Cal.4th at pp. 1048, 1050.) Probative value is "enhanced" if the witness providing the evidence is not also providing evidence of the charged offense, "because the risk that the witness's account was influenced by knowledge of the charged offense is thereby eliminated." (*Id.* at p. 1047.)

On the other hand, various factors can minimize the potential prejudicial impact of a prior offense. (*Tran, supra,* 51 Cal.4th at pp. 1047-1049.) Prejudicial impact is lessened where the prior offense "resulted in a criminal conviction," because the jury would not be inclined to punish the defendant to prevent him from "escaping punishment" for the extortion. (*Id.* at p. 1047.) There is little risk of confusion because the jury will not have to determine whether the uncharged acts occurred. (*Ibid.*) Prejudicial impact is also lessened when the evidence of a defendant's prior offenses was "no stronger or more inflammatory" than the testimony about the charged offenses. (*Ibid.*) A limiting instruction also minimizes prejudicial impact. (*Id.* at p. 1049.)

Applying this analysis to defendant's 2008 robbery conviction, we conclude that it was admissible under Evidence Code section 352. To start, the conviction was highly probative. The abstract of judgment established that defendant committed the robbery in 2008, which, coupled with the gang expert's testimony that defendant had admitted to him in 2008 that he was a member of South Side Fontana, provides direct evidence of: (1) a predicate offense in a "pattern of criminal gang activity," (2) a "criminal act" making up South Side Fontana's "primary activities," and (3) defendant's knowledge that the gang engaged in a pattern of criminal activity. (See Pen. Code, § 186.22, subds. (e), (f).) Moreover, as in *Tran*, the probative value was enhanced by the fact that the source of the 2008 robbery conviction, i.e., the abstract of judgment, was independent of the witnesses providing evidence of the charged crimes. (*Tran, supra,* 51 Cal.4th at p. 1047.)

Furthermore, the risk that the conviction would unduly prejudice defendant was low because all of the mitigating factors discussed in *Tran* were present. First, the abstract of judgment made clear that defendant was convicted, and therefore punished, for the crime. Second, the information contained in the abstract is no stronger or more inflammatory than the evidence of the charged offenses. The abstract simply contains the date of the robbery and the two-year sentence imposed. The jurors heard no evidence about the identity of the victim(s) or about the means by which defendant accomplished that robbery, such as whether he was armed or used threats of violence.

In all, the prosecution took no more than a few moments of trial time to introduce the abstract, and defendant does not argue that the prosecutor focused on his prior conviction in argument to the jury. The brief, sanitized account of defendant's prior robbery is far less inflammatory than the victims' trial testimony that defendant entered a restaurant during business hours, pointed a gun at the people inside, and ordered them to get on the floor.

Third, the trial court twice gave a limiting instruction that the jury could not consider defendant's 2008 conviction as evidence of his character or propensity to commit crimes.

Defendant argues that *Tran* is inapplicable it did not involve a prior conviction for the same offense as the one charged. He contends that his prior robbery convictions were unduly prejudicial because he was on trial for robbery. We disagree. There is no prohibition against admitting evidence of a prior offense that is the same as the charged offense. The analysis of whether evidence of a prior crime is unduly prejudicial in the gang context is a "weighing process" that considers many factors. (*Tran*, *supra*, 51 Cal.4th at p. 1047.) We have considered those factors and conclude that the evidence of defendant's prior offense was not unduly prejudicial.

We also reject defendant's argument that the abstract of judgment was unduly prejudicial because the jurors likely regarded his two-year sentence as "too lenient." The prejudice analysis looks at whether or not a punishment was imposed for an uncharged offense; it does not focus on the perceived severity or adequacy of the punishment. (See,

e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 405; *Tran*, *supra*, 51 Cal.4th at p. 1047.) We presume that a defendant's conviction for a prior offense is sufficient to dispel the risk that the jury will feel he "escaped punishment." (*Tran*, *supra*, at p. 1047.) Otherwise, challenges to evidentiary rulings would require courts to analyze the sufficiency of prior sentences based on abstracts of judgment or other evidence containing little to no details about the underlying crimes. Neither a judge nor a juror could say whether two years was sufficient punishment for the 2008 robbery based on the limited information contained in defendant's abstract of judgment.

Lastly, defendant argues that his prior offense was unnecessary to prove the gang enhancement. He asserts that his prior offense was cumulative in light of the multiple convictions against other South Side Fontana members.

In response to the same argument, the court in *Tran* held that Evidence Code section 352 "does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity" simply because "the prosecution might be able to develop evidence of predicate offenses committed by other gang members." (*Tran, supra,* 51 Cal.4th at p. 1049.) To hold otherwise "would unreasonably favor defendants belonging to large gangs with a substantial history of criminality." (*Ibid.*) Additionally, a court "need not limit the prosecution's evidence to one or two separate offenses lest the jury find a failure of proof as to at least one of them." (*Ibid.*) Instead, the court must weigh the probative value of each piece of gang-related evidence against the risk of prejudice. The risk of prejudice tends to increase as the number of

prior offenses increases, but the court can reduce this risk by limiting the amount of detail about the prior offenses and providing a limiting instruction. (*Ibid.*)

The convictions against the other South Side Fontana members were highly probative of the elements of the gang enhancement, and, as was the case with defendant's prior conviction, their introduction at trial was brief and lacking in any inflammatory details. While the risk of prejudice may have increased incrementally with the introduction of each conviction, we conclude that any prejudice was sufficiently minimized by the brief, noninflammatory nature of the evidence and the trial court's limiting instruction.

ii. *Any error was harmless*

Any error in admitting defendant's prior robbery conviction, that error would be harmless. "We evaluate error in the admission of prior crimes evidence using the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . under which we determine whether it was 'reasonably probable that a result more favorable to defendant would have resulted' had the prior crimes evidence not been admitted." (*People v. Williams* (2009) 170 Cal.App.4th 587, 612 [Fourth Dist., Div. Two] (*Williams*), quoting *People v. Welch* (1999) 20 Cal.4th 701, 750.) Evidentiary errors are harmless where the strength of the People's case is "overwhelming" compared to the strength of the defense. (*People v. Marks* (2003) 31 Cal.4th 197, 229.)

"The danger in admitting gang evidence is that the jury will improperly infer that the defendant has a criminal disposition." (*Williams, supra*, 170 Cal.App.4th at pp. 612-613, citing *People v. Cardenas* (1982) 31 Cal.3d 897, 905.) Here, evidence independent of defendant's prior conviction overwhelmingly established defendant's guilt of the substantive offenses and the truth of the gang enhancement allegations. According to video surveillance footage and the eyewitness testimony of the victims and the arresting officers, defendant, not Buzenes, fit the description of the robbery gunman when the three suspects were arrested. And, when the police searched the car, they found the gun in the backseat next to defendant.

As to the gang enhancement, other evidence supports the finding that he committed the charged crimes for the benefit of South Side Fontana. For example, Buzenes admitted that he and defendant were members of the gang, and the gang expert testified that Vega was also a member. Additionally, the expert—who had significant experience working in Fontana's gang unit, specialized in South Side Fontana, and had previous contacts with all three men—testified that they committed the September 6, 2012 crimes for the benefit of the gang.

On the other hand, the defense theory that defendant was asleep in the car during the robbery was unconvincing. In order to believe Buzenes's account of the robbery, the jurors would have to accept that Buzenes had time to change out of the clothing he borrowed from defendant before driving away from the scene, and that there was enough time for him to discard the gun and for him and defendant to put their shoes on before the

police reached the car. This account is difficult to accept in light of the arresting officers' testimony.

One of the officers who watched the two men flee the restaurant testified that only *5 to 10 seconds* passed in between the time he saw them running to when he saw the car exit the industrial park. It seems implausible that a person could remove and discard a jacket, pants, and shoes, start a car, and drive out of a parking lot, all in the span of ten seconds. Additionally, when the police searched the area near where the getaway car was parked, they did not find the pants Buzenes allegedly discarded. They also saw no movement in the backseat of the stopped getaway car during the time defendant and Buzenes allegedly were putting on their shoes and Buzenes was discarding the gun. Lastly, Buzenes's testimony depends on defendant being so ill from heroin use that he slept through the commotion of the robbery; however, during the arrest, the police saw no indication that he was ill or intoxicated.

It is not reasonably probable that the jury would have been more likely to believe Buzenes's story if only it had not learned that defendant had been convicted of a robbery in the past. We have no doubt the jury would have reached the same result in the absence of evidence of defendant's prior robbery conviction.

d. *The other gang members' convictions*

Defendant contends that the admission of 15 prior convictions of the other South Side Fontana members (the other convictions) was cumulative and therefore unduly prejudicial. He argues that the prosecution could have sufficiently proven the "pattern of criminal [gang] activity" with evidence of four or five convictions. Even if defendant had not forfeited this argument by failing to raise it at trial, the argument lacks merit.

i. *Defendant forfeited his claim*

Aside from his own conviction, the only other convictions defendant objected to were his brother's, and on relevancy grounds. (See section II.1.b, *ante*) Absent a timely and specific objection, a claim of evidentiary error is forfeited. (See Evid. Code, § 353.) "[W]e have consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Seijas* (2005) 36 Cal.4th 291, 302 (*Seijas*).)

ii. *The other convictions were not unduly prejudicial*

Defendant argues that after proof of "four or five" convictions, the probative value of each additional conviction was "zero," because the prosecutor only needed to prove "two or more" predicate offenses in order to establish the "pattern of criminal gang activity" required under section 186.22, subdivision (b). We disagree.

First, predicate offenses were not all that the prosecution had to prove in order to trigger the gang enhancement. It also had to "establish that one of the gang's primary activities was the commission of one or more of the crimes listed in section 186.22,

subdivision (e)." (*Williams*, *supra*, 170 Cal.App.4th at p. 608, citing *People v. Sengpadychith, supra,* 26 Cal.4th at p. 322.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.)

Here, the other convictions, taken together, demonstrated that different members of South Side Fontana committed several of the crimes listed in section 186.22, subdivision (e) on a number of different occasions. Thus, in addition to evidencing a pattern of criminal activity, the convictions also helped the prosecution establish that South Side Fontana members consistently and repeatedly carried loaded firearms and engaged in robbery and assault with a deadly weapon.

Second, while a "pattern of criminal gang activity" can be established by as few as two enumerated offenses committed on separate occasions or by two or more persons (*Williams*, *supra*, 170 Cal.App.4th at p. 609), a court does not abuse its discretion if it allows evidence of more than two offenses (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1139). There is no "bright-line" rule for how many offenses the court can admit before the evidence becomes cumulative and unduly prejudicial. (*Williams*, *supra,* at p. 611.) In *Williams*, the court held that evidence of "at least eight" predicate offenses was cumulative and unduly prejudicial because the volume of this evidence extended the trial "beyond reasonable limits" and resulted in "endless [admissibility] discussions" resembling a "virtual street brawl" among counsel and the trial court. (*Id.* at pp. 609,

611.) By contrast, in *Hill*, the appellate court upheld the admission of evidence of eight predicate offenses where the gang expert's testimony about the offenses was brief and stated minimal details, i.e., the name of the defendant, the type of offense, and the conviction date. (*People v. Hill*, *supra*, at pp. 1138-1139.)

The facts of this case are more like *Hill* than *Williams* because the gang expert's testimony regarding the other convictions was brief and lacked any emotional or inflammatory detail. The prosecutor showed the gang expert the nine abstracts of judgment containing the other convictions, and the expert testified that he knew the convicted individuals to be members of South Side Fontana. In total, this testimony spans 10 pages of an 856-page trial transcript.

Moreover, defendant appears to concede that four or five of the convictions were admissible and probative of the gang enhancement allegations, this leaves only 10 or 11 other convictions that could potentially cause undue prejudice. Of these 10 or 11 convictions, five are against Vega and Buzenes in connection with the September 12, 2012 crimes. Those five convictions are not prejudicial because Buzenes's testimony independently established Vega's and Buzenes's involvement in the crimes. This puts the number of convictions that could even arguably cause prejudice at five or six.

We cannot conclude that the evidence of the other convictions (whether analyzed as 15 convictions or just six) consumed an unreasonable amount of trial time or that there is a reasonable likelihood that the "jury's passions were inflamed" by this testimony. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) The other convictions were not unduly

prejudicial. Even if it were error to admit some number of the other convictions, the error is not reversible in light of the overwhelming evidence of defendant's guilt and the truth of the gang enhancement allegations. (See section II.1.c.ii. *ante*.)

e. *Vega's guilty plea to the charged robbery*

Defendant argues that admission of Vega's guilty plea was "improper evidence of guilt by association," as Vega was one of two men guilty of the robbery and defendant was in the getaway car with him. Again, defendant forfeited this argument by failing to object to the admission of Vega's guilty plea at trial. (*Seijas*, *supra*, 36 Cal.4th at p. 302.) Nevertheless, Vega's plea did not create undue prejudice of guilt by association. There was overwhelming evidence, independent of the plea, that Vega was guilty of the robbery. For example, defendant's own witness testified that Vega had committed the robbery.

f. *The booking document and the gang report*

Defendant argues that the 2011 booking document and the expert's testimony about the contents of the gang report was unduly prejudicial and inadmissible hearsay. Defendant forfeited the hearsay argument because, as he concedes, he never objected on that ground at trial.

More importantly, however, any error in admitting the challenged evidence on either ground is harmless in light of the independent and overwhelming evidence that defendant was a gang member. Buzenes admitted that defendant had been a gang

member for about four years, and the gang expert testified that defendant admitted to him in 2008, 2010, and in 2011 that he was a member of South Side Fontana.

g. *CALCRIM No. 1403 was effective as a limiting instruction*

Defendant argues that CALCRIM No. 1403, the standard instruction concerning the limited purpose of gang-related evidence, was ineffective in mitigating the prejudicial impact of the evidence he challenges on appeal. We disagree.

"The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions," and the California Supreme Court has made it clear that challenges to the efficacy of limiting instructions should be rejected as "entirely speculative." (*People v. Homick* (2012) 55 Cal.4th 816, 866-867.) In *Homick*, the court rejected the defendant's argument that the instruction that evidence of his status as a drug dealer could not be considered as character or propensity evidence was "inadequate to dispel any prejudice." (*Id.* at p. 866.) The court held that "[a]ny prejudice that the challenged information may have threatened must be deemed to have been prevented by the court's limiting instruction to the jury." (*Id.* at pp. 866-867.)

Defendant asserts that this well-established rule is inapplicable here because gang evidence like the kind admitted in his case is among the "types of evidence [that] are so difficult to . . . consider for one purpose but ignore for another" that curative instructions are "deemed incapable" of limiting prejudice. (*People v. Charles* (1967) 66 Cal.2d 330, 338.) The cases he relies on involve extremely prejudicial evidence, such as testimony referencing a defendant's inadmissible confession in violation of the court's ruling and

videos of "emotional testimonials" by families of victims of offenses similar to those charged at trial. (*People v. Navarette* (2010) 181 Cal.App.4th 828, 836 [inadmissible confession]; *People v. Diaz* (2014) 227 Cal.App.4th 362, 383 [video testimonials].) In contrast, the evidence challenged here was neither emotional nor inflammatory, it consisted of minimal detail, and it consumed minimal trial time.

Moreover, CALCRIM No. 1403 is routinely used to limit potential prejudice arising from gang-related evidence, and courts have approved the instruction as clear and effective. For example, in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, the court stated that "CALCRIM No. 1403 . . . states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity." (*Id.* at p. 1168.) We will not question whether the jurors could understand this clear directive. Instead, we presume the instruction was effective in limiting potential prejudice.

h. Defendant's other contentions: fair trial and cumulative error

Because we reject defendant's argument that the limiting instruction was inadequate to minimize the potential prejudice of the challenged evidence, we also reject his contention that admission of the evidence violated his right to a fair trial. Defendant correctly asserts that a defendant's constitutional right to a fair trial is violated when instructions invite the jury to draw an inference of criminal propensity or guilt by association from evidence of uncharged offenses. (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 776, revd. on other grounds *sub nom. Woodford v. Garceau* (2003) 538

U.S. 202.) But that did not happen here. The prosecution introduced the gang-related evidence to prove the elements of the gang enhancement, and the trial court prohibited the jury from considering it as character or propensity evidence.

Moreover, because his right to a fair trial was not violated, we reject his argument that we should review the "cumulative" impact of the alleged evidentiary errors under the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18. This standard applies only to evidentiary errors of a federal constitutional magnitude. (*Id.* at p. 24.)

2. *The Count 2 Sentence*

In its sentencing brief and at the sentencing hearing, the prosecution recommended that the court stay the sentence for the assault against the shift manager charged in count 2 because it arose from the same transaction and involved the same victim as the robbery charged in count 1. The defense agreed with this analysis. The trial court imposed the sentence for count 2, reasoning that the victim of the robbery was the restaurant and the victim of the assault was the shift manager.

On appeal, defendant contends and the People concede that defendant's sentence for the assault charged in count 2 should be stayed pursuant to section 654. We agree.

Section 654 prohibits multiple sentences based on an indivisible course of conduct in which there was only one victim and during which defendant harbored only one criminal objective. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Islas* (2012) 210 Cal.App.4th 116, 130.) Where there is no dispute over the underlying facts,

we review the applicability of section 654 de novo. (*People v. Valli* (2010) 187 Cal.App.4th 786, 794.)

Here, the facts that support the robbery conviction are the same facts that support the assault conviction. Specifically, the prosecution presented evidence that defendant entered the restaurant and pointed a gun at the shift manager and told her and the others to get on the floor. Vega then forced the shift manager into the back office to open one of the safes. After Vega took the money inside the safe, he and defendant left. Defendant only pointed the gun at the shift manager once, in order to accomplish the robbery; he did not point the gun at her after Vega took the money. These facts demonstrate that defendant harbored the same criminal objective—taking money from the restaurant—while committing both offenses.

As to the issue of the victims, the restaurant could not have been the victim of the robbery as a matter of law. Only a person can be the victim of a robbery. (See, e.g., *People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064; *People v. Jordan* (1984) 155 Cal.App.3d 769, 782 [concluding that the corporation's employee was the victim of the attempted robbery of the corporation, because "[a]n accusation of the robbery or attempted robbery of [the corporation] necessarily implies that the taking by force or fear be from the presence or possession of some officer or employee of [the corporation]"].) Because we conclude that the robbery and assault arose from the same course of conduct and were perpetrated against the same victim (the shift manager), we will direct the trial court to stay execution of the sentence for the assault in count 2.

III

DISPOSITION

Defendant's sentence is modified by staying execution of the sentence imposed for count 2, pursuant to Penal Code section 654. As modified, defendant's sentence is affirmed. The trial court is directed to prepare an amended abstract of judgment that reflects defendant's modified sentence and to forward copies of that abstract to the appropriate agencies. The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.